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Supreme Court of the United States

October Term, 1959

No. 1026 166

PETER HOLM,
Petitioner,

against

AMERICAN SHIP BUILDING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled matter on March 23, 1960.

Opinions of the Courts Below

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, Hon. James C. Connell, in favor of respondent, is unreported and is set out in the appendix to this petition at pages 26-31.

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the Trial Court, is reported at 276 F. 2d 201, advance sheets, and is set out in the appendix to this petition at pages 23-25.

Jurisdiction

This action for money damages for respondent's failure to provide petitioner with a reasonably safe place to work, predicated upon diversity of citizenship, having the requisite jurisdictional amount, was brought in the United States District Court for the Northern District of Ohio, Eastern Division.

The Order of Dismissal and Judgment thereon, entered on February 12, 1959, was appealed from by petitioner.

The decision of the United States Court of Appeals for the Sixth Circuit affirming the Judgment of the lower Court was filed on March 23, 1960.

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254(1).

Questions Presented

1. Whether the Court below deprived petitioner of any substantive admiralty rights as defined in the controlling acts of Congress or by interpretive judicial decision in ruling that state law was applicable because a complaint was filed (having proper diversity of citizenship and requisite jurisdictional amount) rather than a libel in Admiralty, in a cause arising out of a maritime tort.

2. Whether the Court below destroyed petitioner's substantive admiralty rights by failing to cure any deemed defective jurisdictional averment in view of knowledge of the ultimate facts pleaded and the evidence introduced, all of which conclusively proved that the cause was within the admiralty jurisdiction.

3. Whether the Court below failed in its duty to lay to rest a rejected principle of law narrowing the sweeping scope of admiralty jurisdiction in not determining the fundamental jurisdictional problem, considering the resultant decision and its destructive inroads upon the accepted admiralty jurisdiction as laid down by Congressional fiat and judicial interpretation.

4. Whether the Court below deprived petitioner of substantive admiralty rights in this maritime tort by ruling that discredited common law principles were applicable with its attendant duty upon the respondent only to warn of latent dangers (rather than to afford a reasonably safe place to work), thus destroying the liberal maritime concept of comparative negligence in mitigation of damages and applying the archaic doctrine of assumption of risk as a complete bar.

Statement of Facts

Peter Holm, fifty-seven years old (4),[1] married (7), with a history of service in the United States Navy (6), and with the Merchant Marine as a Watchman, Oiler and Fireman (8, 9, 10), was the shipkeeper (watchman) and sole person (25) aboard the S.S. "Ayers" (18), an ore boat (35), owned by Great Lakes Steamship Company, laid up for repair in the respondent's shipyard (19). His duties were to set the lines, see that the cables were tight, and to take care of the supplies (14).

Petitioner joined the ship in November, 1954 (18), remained until March 8, 1955, when the accident complained of herein occurred (19). He lived aboard the vessel (36).

The sole means of access to the vessel was a wood and iron gangway (21, 37, 126), 60-70 feet long and four feet wide (130). Attached to a pivot and platform, in turn at-

[1] References are to pages of the Trial Transcript.

tached to the center of the ship (36) and with a pipe rack at the bottom end resting on the dock (128), the gangway was able to move with the surge of the ship (21-22, 128). Consisting of planks running up and down, the gangway had angle iron railings and cleats set across the planks to give surer footing (22). There were no cross members or stays, safety or guard wires between the upper railing and the gangway planks (40), as corroborated by the respondent's employees (102). The top of the gangway was about thirty feet high (32) since the vessel was riding light (13). The "AYERS" was tied up at the pier (24) by cables fore and aft (31).

The gangway, by law part of the vessel, was owned by the respondent (126) and was positioned onto the vessel for the use of those persons having work aboard her and on another vessel lying off shore and lashed to the "AYERS" (25, 116, 119). The one gangway was used from November to the date of the accident (51).

Petitioner testified that the drain holes on the gangway were constantly clogged up (39), that it was very slippery all the time (71), was slippery when it snowed or rained from the time that he joined the ship (55, 56), that the cleats were worn in the places where the men walked (72), and were slippery when the weather was damp (57), that the snow, ice and moisture could not go through to drain off (102). He further stated that he repeatedly requested rock salt for the gangway and the drain holes in order to break up the ice (19, 20, 39, 56) and was told by the foreman that it would be taken care of. It never was (20) except once around Christmas (20-21), though the salt was used in the yard to break up snow and ice (131).

The vessel was in the yard for repair [replacement of part of the wheel and for new plates] (119), as were all the boats (respondent would not permit ships to dock unless there was ample repair work to be done (118-119)) and was to be kept until spring (119). Respondent employed four

hundred men for repair of the vessels (115), who were working on the boats on the accident date (93), all of whom used the one gangway every day, with its resultant considerable wear and tear.

On the morning of March 8, 1955, the day of the accident, the petitioner left the ship (24) returning to the vessel shortly thereafter. At that time he saw frost on the gangway and snow on the deck of the ship (58). The weather was freezing (61). In the late afternoon the petitioner again left the ship to buy some groceries and a magazine (26, 95). He had to sign out and in with the pier gate guard (27) who was approximately two blocks from the ship (26), spoke to him about the weather and the slippery condition of the area (26). There was a light snow that afternoon (76).

When the petitioner returned to the pier gate about 5:45 or 6:00 P. M. (26, 95), he had some bread, eggs, milk, a newspaper and magazine (27) and stopped to talk to the gateman for 25 or 30 minutes (28).

He then proceeded to the vessel and started up the gangway carrying the bundle in his left hand, his right hand on the rail (23). As he reached close to the top of the gangway, walking unhurriedly, he slipped on a worn, slippery cleat (39, 40), hung on with his right hand for a moment and then fell through under the railing where the cross members were missing and which would have stopped him, crashing down to the dock below.

Petitioner came to the next day (41) in the hospital, with fractures of the hip, leg, ribs, pelvis and finger (41). He was discharged to outpatient treatment from the Detroit Marine Hospital in June, 1956 (73), some fifteen months later and was unable to return to work up to the date of trial (44).

During the trial petitioner was denied the opportunity of proving that his presence aboard the vessel and his

duties thereon were for the mutual benefit of both the shipowner and the respondent shipyard (121-123), all of which would have established petitioner's legal position aboard the vessel and gangway, his relationship with the shipowner, and his right to use the gangway in furtherance of his employment.

On the respondent's motion for a directed verdict, based upon a discharge of its duties and petitioner's assumption of risk, the Trial Court dismissed the complaint (147) on the following erroneous grounds:

(a) denying the applicability of admiralty law and principles in the case;

(b) denying that petitioner performed the services for the mutual benefit of his employer and respondent by the simple expedient of rejecting the offer of evidence on the issue;

(c) drawing conclusions of facts, not supported by any evidence, that the gangway involved was not for petitioner's use when it was known by the respondent to be the sole method of access and ingress to and from the vessel for four months;

(d) erroneously concluding that improper maintenance of the gangway could not make the gangway defective;

(e) drawing the conclusion of fact, unsupported by any evidence, that there was a policy of shipkeepers generally to put up and lash a ladder to the ship and not to use the accommodation gangway, although the latter was concededly easier and safer (if properly maintained) to use;

(f) determining that the gangway railing was constructed properly and gave proper protection, though obviously a question of fact for the jury;

(g) applying state common law principles of assumption of risk as the complete bar rather than the principles

of the general maritime law, which would not permit the defense under the circumstances herein;

(h) conceding foreseeability by the respondent that petitioner would use the gangway and then denying that the respondent had any duty to the petitioner other than that to a licensee under state land common law not to entrap him.

Petitioner appealed to the Court below from the order of dismissal and judgment, which Court affirmed the dismissal by the Trial Court on March 23, 1960.

Reasons for Granting the Writ

The decision of the Court below is in direct conflict with four basic concepts of law previously laid down by this Court. Those many decisions by this Honorable Court have been in aid of plaintiffs in personal injury cases who were deprived of their constitutional right to jury trial by Judges who, by refusing to assess an action in the light of modern, liberal, judicial procedure and concept of substantive law, effectively destroyed the claims of persons torn in body and spirit, the unfortunates of our industrial behemoth.

This Court has recently admonished the Courts of Appeals that inroads upon the jury's province would not be tolerated, *Schulz* v. *Pennsylvania*, 350 U. S. 523; *Rogers* v. *Missouri*, 352 U. S. 500; *Ferguson* v. *Moore-McCormack*, 352 U. S. 521; *Webb* v. *Illinois*, 352 U. S. 512; *Arnold* v. *Panhandle*, 353 U. S. 360; *Shaw* v. *Atlantic*, 353 U. S. 920; *Futrelle* v. *Atlantic*, 353 U. S. 920; *Deen* v. *Gulf*, 353 U. S. 925; *Thomson* v. *Texas*, 353 U. S. 926; *Ringhiser* v. *Chesapeake*, 354 U. S. 901; *Gibson* v. *Thompson*, 355 U. S. 18; *Stinson* v. *Atlantic*, 355 U. S. 62; *Honeycutt* v. *Wabash*, 355 U. S. 424; *Butler* v. *Whiteman*, 356 U. S. 271. See also: Chief Judge Clark's dissenting opinion in *Filipek* v. *Moore-McCormack*, 258 F. 2d 734 (2nd Circuit).

This matter is of national importance not only because of the denial of the effect of those many decisions of this Court but additionally because of the increased tendency of the Courts below to "clear the calendars" of the backlog of thousands of personal injury cases in the various Courts throughout the United States. Injured persons, constituting a substantial proportion of litigants, are of national importance if only because of sheer weight of numbers. Any decision which affects them as a class carries with it a burden affecting thousands.

Aside from destroying the case on the basis of determining questions of fact, from the record and without, in order to obliterate the jury's function, the Trial Court below concluded that petitioner's complaint was not predicated upon a maritime tort, but was to be decided "practically under real estate law" (p. 137) and whether he (petitioner) was a licensee or invitee on their (respondent's) so-called "gangway or ramp" (p. 137).

The Court, in its continuing discussion of respondent's motion for a directed verdict, determined eight issues of fact [2] and then came to the conclusion that since nothing

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[2] The Court erred in making determinations on the following issues of fact:

1. Whether petitioner was performing work which would benefit respondent as well as petitioner's employer (137, 138);

2. Whether petitioner was permitted to and was expected to use the gangway in question by reason of the acquiescence of respondent and the foreseeability that he would do so (138, 146, 147);

3. Whether the gangway was defective by reason of improper maintenance in permitting the snow, ice and other moisture to remain without proper drainage (138);

4. Whether the gangway was defective by reason of the absence of cross members from the railing to the planks of the gangway (139);

5. Whether the gangway was intended for use by all persons, including petitioner, who came aboard the vessel in order to perform duties thereon (139, 140);

was left for the jury's consideration the motion should be granted.

In so doing the Trial Court incorrectly applied state law of Ohio with its archaic common law doctrines of assumption of risk, etc. to this admittedly maritime tort ("* * * we have the case of a man who was hurt in connection with a boat.") (p. 137), rejecting the contention that either statutory or not statutory maritime law was applicable ("we are not here under the Jones Act [3] and we are not here under admiralty.") (p. 137).

The Court of Appeals, seemingly reaching in an effort to sustain the dismissal, erred on four basic propositions of law, error which, if permitted to stand, will give rise to continued attempts to emasculate the sweeping scope of admiralty jurisdiction and doctrine.

1. Determined, erroneously, that filing a complaint, having requisite diversity of citizenship and jurisdictional amount (in order to obtain a jury trial), instead of a libel subjected petitioner to Ohio common law rather than general maritime law principles in an action arising out of a maritime tort. The decision violated the very fundamental ruling of this Court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, wherein this Court stated:

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6. Whether the fact that there was no evidence submitted of previous accidents on the gangway negated the possibility of respondent's negligence in its design and maintenance of the gangway (142);

7. Whether petitioner assumed the risk of the defective gangway by reason of his prior use of it (142, 143);

8. Whether petitioner's use of the gangway rather than possibly putting up a special ladder for his use was an assumption of the risk, considering the fact that he had to carry supplies by hand aboard the vessel for his subsistence (144).

[3] Admittedly not, since Holm was not a crewmember and suit was not brought against his employer.

"Another argument is that Pennsylvania law must govern here because the District Court's jurisdiction was rested on diversity of citizenship under 28 U. S. C. § 1332. For this contention the principle established in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is invoked. That case decided that federal district diversity courts must try state created causes of action in accordance with state laws. This ended a long-standing federal court practice under which the outcome of lawsuits to enforce state created causes of action often depended on whether they were tried in a state courthouse or a federal courthouse. *Erie R. Co.* v. *Tompkins* was thus designed to ensure that litigants with the same kind of case would have their rights measured by the same legal standards of liability. It appears to be contended here, however, that one injured on navigable waters who sues in federal court under diversity jurisdiction somehow jeopardizes his right to have as full a recovery as he otherwise would. It is certainly contended that one who sues on the 'law side' of the docket has much less chance to recover than one who sues on the 'admiralty side'. Thus we are asked to use the *Erie-Tompkins* case to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of parties would depend on which courthouse, or even on which 'side' of the same courthouse, a lawyer might guess to be in the best interests of his client. We decline to depart from the principle of equal justice embodied in the *Erie-Tompkins* doctrine. Of course the substantial rights of an injured person are not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 88-89. The District Court and Court of Appeals correctly refused to deny Hawn's federal right of recovery by applying the Pennsylvania contributory negligence rule" (pp. 410-411).

See also: *McAllister* v. *Magnolia*, 357 U. S. 221, concurring opinion of Mr. Justice Brennan; *Canella* v. *Lykes*, 174 F. 2d 794; *Troupe* v. *Chicago*, 234 F. 2d 253; *Oroz* v.

American, 259 F. 2d 636, all of which rejected the contention that, having diversity of citizenship and the requisite amount involved, no admiralty jurisdiction existed when a complaint was filed in a suit arising out of a maritime tort.

Admiralty jurisdiction arose from a determination of the locale of the tortious act. The mere happening of an accident in navigable waters sufficed to give rise to maritime principles. *Kermarec v. Compagnie*, 358 U. S. 625; *Pennsylvania v. O'Rourk*, 344 U. S. 334; *The Plymouth*, 3 Wall. 20; *Philadelphia v. Philadelphia*, 23 How. 209; *The Commerce*, 1 Black 574; *The Rock Island*, 6 Wall. 213; *The Belfast*, 7 Wall. 624; *Leathers v. Blessing*, 105 U. S. 626; *The Admiral Peoples*, 295 U. S. 649, even if brought in the State Court *Carlisle v. Sandanger*, 259 U. S. 255.

Petitioner respectfully submits that this decision, if permitted to stand, may well corrode the basic principle of uniformity of decision so long a part of maritime principle that locale of the tort determined the applicable law, not the chosen side of the Courthouse.

2. The facts of the case establishing the accident as one which occurred on the gangway of the ship, hence within the maritime jurisdiction, were fully set forth in the complaint, paragraphs 3, 4 and 5:

> "Third: Plaintiff says that on or about the 8th day of March, 1955, at or about 7:00 o'clock P. M., while he was proceeding to the Steamer J. Burton Ayers, which was berthed at the defendant's dock at Lorain, Ohio, and while he was employed as a seaman on board said vessel, and proceeding along a slippery, worn, defective, broken gangway, which was the only means of egress to said vessel, suddenly, and unexpectedly he was caused to slip and fall through the unprotected and dangerous side of said ramp, causing him to fall a distance of approximately 30 feet. That he sustained severe injuries hereinafter more particularly set forth.

Plaintiff says that at the aforesaid time and place there was not sufficient illumination provided.

Fourth: That on the day and date aforesaid, the defendant was the owner of said dock area where the plaintiff was injured, and that the maintenance and control of said dock and gangway was under the direct control and supervision of the defendant.

Further that the defendant had actual and constructive knowledge that said area was being used by the Great Lakes Steamship Company, Inc. as a place to berth its vessels, and that the defendant knew or should have known that seamen, employed by The Great Lakes Steamship Company, Inc. on their vessels, berthed at this dock, would have to use this area as a means of entrance to their vessels and as a means of exit also. Further that the defendants, its agents, servants, and employees had actual and constructive notice of the dangerous condition of the dock area, and in particular the gangway where the plaintiff fell, but that they continued to allow and invite employees of the Great Lakes Steamship Company, Inc., working on the Steamer J. Burton Ayers, to use said area as a means of entrance to their vessel, when they were well aware of this dangerous condition.

Fifth: That in violation of the duties and obligations imposed upon the defendant by the State of Ohio, Ordinances of the City of Lorain, Ohio, and the rules of common law, the defendant by its agents, servants, workmen and employees, was careless and negligent:

(a) in negligently and carelessly failing to construct a proper protective guard railing on the sides of said gangway,

(b) in failing and neglecting to give proper notice to the employees of the Great Lakes Steamship Company, Inc., working on the Steamer J. Burton Ayers, at the aforesaid time and place of the existence in that area of this dangerous condition,

> (c) in negligently and carelessly inviting and allowing the employees of the Great Lakes Steamship Company, Inc., particularly this plaintiff, to use said area, when the defendant had actual and constructive knowledge or knew or should have known of the slippery and worn condition of the gangway and also of the makeshift and improperly illuminated rails on the side of said gangway."

The Court's conclusion that the principles of law to be applied were those of the common law was not grounded upon the language of the complaint but rather was based upon examination of the complaint, a rejection of admittedly inartistic language, appreciation of the facts alleging a maritime tort and a deliberate and considered (and erroneous) opinion that state real estate law was applicable. Any contention that the Trial Court was either misled or was not properly apprised of petitioner's contention is not supported by the record. The Trial Judge quite obviously considered the possibility that this cause came within admiralty principles and expressly rejected it. What more could petitioner do; what more should he have done!

An issue on appeal is properly preserved when a party has made known his position to an order or ruling of a Trial Judge and the Court knows the grounds of the objection. Rule 46 of the Federal Rules of Civil Procedure; *Troupe* v. *Chicago*, 234 F. 2d 253. The Trial Court, having full knowledge of the facts, the duty of the Court to determine the matter upon the proper jurisdictional basis was inescapable.

There was and is no change of theory by petitioner. A maritime tort was certainly pleaded as the ultimate fact set forth in the complaint, was amply supported by the evidence, was fully considered and rejected by the Trial

Judge on respondent's motion, duly excepted to, and was raised again on appeal before the Sixth Circuit. With knowledge of the facts alleged in the complaint and established by the evidence the Court below certainly had the power, and indeed the responsibility, to examine the whole record and establish the correct jurisdictional basis of the suit by curing any deemed defective averment of jurisdiction. *Sun* v. *Publishing*, 194 U. S. 377; *Troupe* v. *Chicago*, 234 F. 2d 253. As such, the decision of the Court below appears to be contrary to the decisions above cited and to the now settled principle of law laid down by this Court in *Taylor* v. *Hickman*, 329 U. S. 495, at page 501, that a complaint under the Federal Rules of Civil Procedure need be only "general notice-giving" to the wrongdoer with a minimum of facts to state the nature of the claim.[4]

Petitioner submits that the decision of the Court below is alarming because of its return to the narrow, long discarded and discredited common law concept of pleading that would demand from an injured party the onerous burden of immediately setting forth and forever strictly adhering to any ultimate facts and applicable law pleaded, without possibility of subsequent modification resulting from the extensive pre-trial and discovery procedure consistently advanced by this Court as proper and equitable.

3. While the Trial Court rejected the applicability of maritime principles, the Court below would not pass on the subject in binding petitioner to common law negligence concepts. Petitioner submits that admiralty principles do indeed apply in this cause arising out of a maritime tort.

The gangway leading to a ship has always been considered an appurtenance thereof. Since *The Admiral Peoples*, 295 U. S. 649, all Courts, without exception, have agreed

[4] Actions of counsel harmful to the client cannot bind the client if the Court or opposing counsel are not misled. *Dixon* v. *United States*, 219 F. 2d 10.

that an accident on the gangway of a ship came within the admiralty jurisdiction, subjecting the parties to the principles of maritime law solely by virtue of its locale. See also: *Brady* v. *Roosevelt*, 317 U. S. 575; *Vancouver* v. *Rice*, 288 U. S. 445; *Grillo* v. *Royal*, 139 F. 2d 237; *Radoslovich* v. *Navigazione*, 72 F. 2d 367; *The No. 34*, 25 F. 2d 602; *Standard* v. *Robins*, 32 F. 2d 182.

While not expressly rejecting the applicability of admiralty jurisdiction, the overall view by the Court below in the context of its decision could and may well be interpreted as an application of common-law principles in this matter.[5]

As such, to reverse the possible extension of common law principles in matter of maritime torts, petitioner respectfully submits that the cause be reviewed and be declared anew to be within the admiralty jurisdiction and not subject to the anachronisms of the common law.

4. The question of whether petitioner was entitled to a safe place to work under maritime principles rather than only to be the recipient of a warning of latent defects known to the owner has been discussed on many occasions in the effort to distinguish and discard the confusing and now largely discredited common law doctrine of assumption of risk.

The decision of the Court below has created a spectre of a return to that very law which this Court and the several Courts of Appeals have consistently rejected as inapplicable in the maritime setting.

In *Pope & Talbot* v. *Hawn*, 346 U. S. 406, at pages 408-410, this Court apparently settled this very issue in re-

[5] Failure of the Court to give credence to the substance rather than the form of the suit may not be recalled by other courts in the sometimes overzealous attempts to cite controlling authority.

jecting the contention that state law governed by common law doctrine could ever control a cause of action arising out of a maritime tort. While the discussion in the *Hawn* case centered about the doctrine of contributory negligence, the same fallacious argument of state law supremacy has now been upheld by the Court below.

The rule that the duty of respondent to provide a reasonably safe place to work was terminated with its warning of latent defects (which the Court below held to be unnecessary as being patent) was one of common law assumption of the risk by a workman of known defects rather than a "no duty" rule of law. The defense was unavailable in this cause of action applying maritime principles. Perhaps in a land accident in which the archaic (and discredited) doctrine was in full bloom an obvious defect would have ended the duty to further act, but where knowledge by the worker of the defect did not obliterate liability, the owner cannot rely upon such knowledge to sustain its primary burden of providing reasonable safety. Thus—while the duty of an owner under both land and maritime principles may rest primarily upon proof of notice of the defective condition, either actual or constructive, the question of defenses available to that owner constitutes a prime difference between the two systems of law.

Guerrini v. *United States*, 167 F. 2d 352, involved an action by the employee of a subcontractor who slipped in oil on the deck of the ship in a yard for general overhaul. The District Court had held that the owner had not surrendered control of the ship.

The Appellate Court then held that state law was applicable (the case was decided prior to *Pope & Talbot* v. *Hawn, supra; Halecki* v. *United*, 251 F. 2d 708, and other recent cases holding that maritime principles would apply), that under New York law the duty to the libellant was the same as that of employer to employee. Thus—the Court

defined the basic distinction between the mere duty to warn of latent defects and the affirmative duty to provide reasonable safety.

The Court further expressed the thought that the duty only to warn was actually predicated upon the common law doctrine of assumption of risk as a complete bar and that the lack of the defense in admiralty created a continuing duty beyond the common law veil. In holding that the shipowner's duty went further than merely to warn, the Court stated:

> "As we said in that case, the New York decisions appear not to distinguish the measure of care due to a 'business guest' from that due from his employer to an employee; and, if so, a failure to use reasonable care to provide for the 'guest's' safety is a breach of duty, even though the danger be apparent. At times opinions have read as though the duty was limited to pointing out the dangers and not including any affirmative provision for the safety of the 'guest' while on the premises. It is not surprising that this ambiguity should arise, because practically it makes no difference, since even though the owner's duty be the broad one, contributory negligence or assumption of risk is an absolute bar. However, in a suit in the admiralty the distinction becomes important, because if the shipowner owes a positive duty to provide a safe place, regardless of the openness of the danger, the 'guest's' contributory negligence is not a bar, but only goes in mitigation of damages. This is as true when no statute provides as when one does. Moreover, whether the defence is total or partial, depends upon the forum. Being therefore obliged to decide whether in New York the duty goes beyond warning the 'guest' of any dangers, we hold that the more common expression is authoritative, and that the duty is the same as that of employer to employee" (pp. 355-356).

Gindville v. *American*, 224 F. 2d 746, involving a longshoreman injured while unloading the vessel, suit for both

negligence and unseaworthiness was brought for stowing cargo in an unsafe manner. Affirming the plaintiff's verdict, the Third Circuit stated:

> "The suit was based, first, upon alleged negligence of the defendant in the manner of loading the cargo and, secondly, upon a charge of unseaworthiness because of the unsafe manner in which the cargo was stowed. The defendant asserts broadly that our decision in Bruszewski v. Isthmian S. S. Co., 1947, 163 F. 2d 720, 1948, certiorari denied 333 U. S. 828, 68 S. Ct. 451, 92 L. Ed. 1113, settles this case in its favor, arguing that the danger, if any, was perfectly apparent and that the plaintiff assumed the risk when he went to work in the face of such apparent danger. We think the Bruszewski case does not stand for any such sweeping proposition as this. Indeed, it is quite narrow. It means no more than if a carpenter is called in to repair a hole in a roof he cannot complain that a roof with a hole in it is an unsafe place to work. Nor do we think that it is fair to characterize the difference between Bruszewski and Gindville as a mere matter of semantics. Gindville did not come to repair any condition. He came to help unload a cargo. If the difference is not apparent further discussion will not make it so" (p. 747).

Again in *Klimaszewski* v. *Pacific*, 246 F. 2d 875, a longshoreman was injured during the loading operation caused by slippage of a winch cable.

> "The appellant complains about the court's instruction on assumption of risk. This question need not trouble us either. As in Gindville, we say here that one need only refer back to Socony-Vacuum Oil Co. v. Smith, 1939, 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265, to get the rule with regard to the application of the doctrines of assumption of risk and contributory negligence in a maritime case. The extension of the rule stated in the Socony-Vacuum

case to longshoremen is shown in Pope & Talbot, Inc. v. Hawn, 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143, and the Gindville case, supra. The new decision of the Sixth Circuit in Imperial Oil, Ltd. v. Drlik, 234 F. 2d 4, certiorari denied, 1956, 352 P. S. 941, 77 S. Ct. 261, 1 L. Ed. 2d 236, is squarely in point with just about every issue raised in this case. *A longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether his action is based on negligence or unseaworthiness*" (p. 877). (Italics ours.)

In *LaGuerra v. Brasileiro*, 124 F. 2d 553, *supra*, the Court further pointed out that the concurrent responsibility of the stevedore to his employees did not avoid the shipowner's negligence; that the negligent order by the stevedore to continue work in the face of the known danger was not an assumption of the risk as a matter of law since the sole choice was loss of the job. The Court therein held that the question was one of fact for determination by the District Court:

"The trial court combined this factor of the nature of the bulkhead with an observation on the skilled nature of stevedoring. Even assuming the responsibility of stevedoring companies towards their employees, and assuming that here the employer was negligent towards plaintiff because the hatch boss required him to continue working under dangerous circumstances, the negligence of the ship was not avoided. Both could be concurrently negligent. Ford v. Allan Line S. S. Co., 227 Mass. 109, 116 N. E. 505; see Deserant v. Cerillos Coal R. Co., 178 U. S. 409, 420, 20 S. Ct. 967, 44 L. Ed. 1127. Certainly we cannot say the command of the hatch boss to continue work was an intervening cause such as to destroy the chain of events.

If the element of the hatch boss's control over the stevedores is to have any bearing, it must be in relation to the question of contributory negligence of plaintiff. This was clearly a question for the jury. In view of the speed of work in unloading, the deci-

> sion of the hatch boss to have the cargo lashed, the fact that the more obviously dangerous bags had been removed, and the order to continue work, we cannot say as a matter of law that plaintiff should have stopped work and risked losing his job in order to avoid the chance that he would be injured. Under the circumstances the jury might not unreasonably conclude that continuance at work was a justifiable exercise of judgment on the plaintiff's part" (p. 555).

In *Troupe* v. *Chicago*, 234 F. 2d 253; *supra*, the Court held that the injured seaman was entitled to her cause of action, both for negligence and unseaworthiness, even when "she admitted that she had used the same and identical steps many times over six previous seasons and that she had safely negotiated them several times on the day of the accident" (p. 256).

The Court below failed to accept the settled concept that there can be no assumption of risk in absence of voluntary choice of safe or unsafe equipment or manner of performance of work, *Palermo* v. *Luckenbach*, 355 U. S. 20. Nor does continuation of work in the face of lack of proper or safe equipment give rise to the defense. *New Berne*, 89 F. 2d 244; *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, *supra*.

Petitioner submits that failure of this Court to review this issue may presage a return to the common law doctrine of duty upon the owner only to warn of latent defects. As stated in *Guerrini* v. *United States*, 167 F. 2d 352, the so-called "no-duty" rule of the owner was nothing more than the recognized common law rule of assumption of risk as a complete bar, a discredited rule of law contrary to basic maritime doctrine. As such, the decision of the Court below will serve to shift the burden of proof of that defense to the plaintiff in an attempt to prove plaintiff's lack of knowledge of the defect, necessary to avoid dilution of the defendant's primary duty under settled principles of maritime law to provide a reasonably safe place to work.

The shift of that burden to injured plaintiffs in the maritime industries must affect every litigant and will strike a fundamental blow to recognized liberal admiralty principle and procedure. Petitioner respectfully submits that the decision of the Court of Appeals should now be reviewed in order to re-establish the uniformity of decision laid down by this Honorable Court.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: June 20, 1960.

Respectfully submitted,

S. Eldridge Sampliner,
Counsel for Petitioner,

Goldstein & Sterenfeld,
Victor G. Hanson,
of Counsel.

Harvey Goldstein,
On the Brief.

APPENDIX

Opinion of the United States Court of Appeals For the Sixth Circuit

No. 13,856

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

—o—

PETER HOLM,

Appellant,

—v.—

AMERICAN SHIP BUILDING COMPANY,

Appellee.

—o—

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided March 23, 1960

Before:

SIMONS, *Senior Judge*, POPE, *Circuit Judge*, and KENT, *District Judge*.

SIMONS, Senior Judge:

The appellant was employed by the Great Lakes Steamship Company as a shipkeeper of the "S.S. Ayers", which was laid up at a dock in the appellee's shipyard in Lorain, Ohio, undergoing repair. The appellant lived on the vessel. In the afternoon of March 8, 1955, he slipped from a wet gangplank, while returning to the ship with groceries, and

was severely injured. He brought this action against the shipbuilding company alleging negligence of the appellee under the laws of "the State of Ohio, Ordinances of the City of Lorain, Ohio, and rules of the common law". The negligence charged was failure to supply a proper guard rail or to give notice of the dangerous condition of the gangway. At the conclusion of the plaintiff's case, the court directed a verdict for the defendant, stating that the case involved Ohio law and that the defendant had fulfilled its duty not to entrap the plaintiff by failure to notify him of the slippery condition of the gangway. He challenges the judgment on the ground that the Court should have applied admiralty law and that it was error to direct a verdict.

The primary question before us is whether the appellant having brought his suit under the law of Ohio by filing a complaint instead of a libel, and having tried the case as a conventional tort action without urging any applicable principle of maritime law, may now completely change his theory upon review and so seek in this court a reversal on the ground that admiralty law controlled adjudication. We may assume, arguendo, without so holding, that admiralty jurisdiction extended to the appellant's injury because received on a vessel in navigable waters. The plaintiff asserts jurisdiction under the doctrine of *The Admiralty Peoples*, 295 U. S. 649, and *Brady* v. *Roosevelt S. S. Company*, 317 U. S. 575. We are, however, constrained to hold, upon cumulative authority, that this theory of the case cannot be raised for the first time upon appeal. *Walker* v. *Felmont Oil Corp.*, 262 F. 2d 163 (6th Cir.); *Reliford* v. *Eastern Coal Corp.*, 260 F. 2d 447 (6th Cir.); *Corbin* v. *B. & O. R. Co.*, 234 F. 2d 78 (6th Cir.); *Curd* v. *Todd-Johnson Dry Dock*, 213 F. 2d 864 (5th Cir.); *Chicago & Eastern Ill. R. Co.* v. *Southern Ry. Co.*, 261 F. 2d 394 (7th Cir.); *Union Pacific Railroad Co.* v. *Johnson*, 249 F. 2d 674 (9th Cir.). In the Corbin case, *supra*, at p. 81, the Court said: "The theory upon which the case was submitted and argued in the District Court cannot, when an adverse judgment results, be discarded and a new, con-

tradictory theory be substituted and successfully invoked on appeal." This is, likewise, the rule in the Supreme Court. *Virginia Ry.* v. *Mullens*, 271 U. S. 220; *Van Huffel* v. *Harkelrode*, 284 U. S. 225. The latest word upon the rule derives from *Thomas W. Nelson and Arthur Globe* v. *County of Los Angeles*, — U. S. —, announced February 29, 1960, wherein it was said: "We do not pass upon petitioners' contention as to the Privileges and Immunities Clause of the Fourteenth Amendment since it was neither raised in nor considered by the California courts."

So, viewing the plaintiff's failure to present a case under the admiralty law, what we have left is an ordinary tort action based upon alleged negligence of the defendant. Whether the plaintiff was a licensee or invitee, need give us little concern. In either status, it was necessary for the plaintiff to prove negligence and its proximate relation to the injury which followed. He knew the gangplank was not in good condition, in that the cleats were worn and would become slippery when the weather was damp. He so testified and also testified that from time to time he actually did slip upon the gangway. Since, under Ohio law, recovery in this type of action is based upon lack of knowledge on the part of the plaintiff as to the dangerous condition, the evidence would not sustain a verdict for the plaintiff. Nor was the defendant obliged to notify him of a hazard of which he was fully aware. "It is only when there are perils or dangers known to the owner, and not known to the person injured, that liability may be established and recovery permitted." *Engelhardt* v. *Philipps*, 136 O. S. 73, 78; *Davis* v. *Shutrump Co.*, 140 O. S. 89. This court has defined Ohio law in conformity with these precedents. See *Creasy* v. *Ohio Power Co.*, 248 F. 2d 745; *Ford Motor Company* v. *Tomlinson*, 229 F. 2d 873. Since there was no obligation to caution the plaintiff about something which he knew, there was no error in directing a verdict for the defendant. Wherefore, the judgment is

Affirmed.

Opinion of the District Court

The Court: Gentlemen, while we have the case of a man who was hurt in connection with a boat, we are not here under the Jones Act and we are not here under admiralty. We are here practically under real estate law, because we get down to a question of what Mr. Holm is to the American Ship Building Company, and whether he is a licensee or invitee on their so-called gangway or ramp.

Now, as counsel for the plaintiff says, we must give the plaintiff's evidence the most favorable interpretation it can possibly receive. There is not any question about that. But let's go into what the plaintiff claims with reference to what the American Ship Building Company did to him, because he said they were negligent towards him.

He worked for the Burton Ayers, he was ship keeper for that boat. He was not an employee of the American Ship Building Company. He worked only for the ore vessel which was tied up at a dock of the American Ship Building Company and which had been apparently tied up there all winter, since along about Thanksgiving Day. He had worked that year on some other boat in some other capacity and chose to be ship keeper during the winter time, and had been keeping this ship for some months before he was hurt.

Now the American Ship Building Company, as the evidence indicates, was in the business of repairing ships. They invited the Burton Ayers to come in and berth at their dock so they could do whatever repairs they were undertaking on that boat. Mr. Holm was not working for them. They attached this ramp to the Burton Ayers for the purpose of having only their own employees use it to go up on the Ayers, and then they attached another ramp of some kind between the Ayers and the boat berthed alongside of it, so that their employees could go across the Burton Ayers onto the attached other ship to make further repairs, because apparently they had more ships than they had docks, I mean ships for the purpose of repair only.

Now, it is the claim of the plaintiff that he fell on a slippery, worn, defective, broken gangway. Was it slippery? He says so. Was it worn? He says so. Was it defective? There is no proof of that. Was it broken? There is no proof of that. So we have his say-so that it was slippery and worn.

Now he says that he fell through the unprotected and dangerous side of the ramp, causing him to fall a certain distance. He said it was the only means of ingress and egress to and from said vessel. At any rate he was trying to get on the vessel at this time. He testified he got up in the morning, went up the street to get a newspaper and other things, noticed how slippery things were, and noticed how bad the ramp was on the occasion of his visit up the street in the morning, but from the evidence before us in the form of a log sheet, it shows he didn't go up the street that morning at all. How he came to give that testimony I wouldn't undertake to say.

He says this ramp was the only means of getting on and off the boat and he would have to use this as a means of entry. I do not find such to be the case at all. This particular attachment or ramp, or gang plank, four feet wide and sixty feet long, was a great convenience to him, although it was not put there for his use at all. It was put there for the use of the employees of the American Ship Building Company in going up on the Ayers and the sister ship for the purpose of making repairs.

It is the custom of ship tenders, these men who look after ships in the winter time, to put up their own ladder and lash it and use it.

It is only on rare occasions anybody puts such a luxurious attachment as this on the side of the ship. That wasn't intended for the use of the crew of the Ayers at all. It was intended for the American Ship Building Company for the benefit of its own men going up there, carrying up there the tools and parts, whatever they could take in that manner. Although there is some evidence when a real heavy thing had to go up it would be lifted by a winch or

the crane. So he wasn't limited to this at all but it was much more convenient to use it than to put up his own ladder, much easier to walk down, and much easier to walk up than to climb up a ladder. Here is an attachment four feet wide and if he was carrying packages he could hug the railing going up there, but whatever the reason, I don't know the reason, he tumbled through and fell off.

From the legal viewpoint the question is what is the responsibility of the American Ship Building Company towards him? Well, his own ship had none towards him because apparently he was paid off under the Longshoremen's Act, and he was paid whatever he could have received through his membership in the ship's crew. I should not have said as one of the ship's crew but through his being one who attended the ship for the winter. So somebody got the idea of suing somebody else and this suit was brought.

Now the claims of negligence are, that "In violation of the duties and obligations imposed upon the defendant by the State of Ohio"—I don't know what that would be except the necessity of using ordinary care— "ordinances of the City of Lorain, Ohio"—which is completely beyond my understanding. There has been no evidence Lorain ever passed any ordinance having to do with this situation. —"and the rules of common law" which apply under the doctrine of negligence. It is claimed under all these rules certain acts of negligence have been committed towards the plaintiff. Now in what respect? "In negligently and carelessly failing to construct a proper protective guard rail on the sides of said gangway."

Apparently it did. This man used it all winter. He never fell off before. I don't know why he fell this time. Apparently all the other people that had to use it every day in coming and going and making repairs on two ships had no trouble. To look at it, it is a stairway, except they

use cleats instead of steps, because it was on such an angle they had to. I see nothing wrong with the construction of this gangway, so-called. And it obviously does have a proper protective guard rail on its sides.

Now, if they have to give notice to this gentleman about the dangerous condition, who knew any more about it than he did? He is using it to go and get papers he never went to get. He said he used it that morning and the record shows he never used it, at least he was never on it to the point he went past the gate to buy newspapers he didn't buy. But he did, at 3:30 in the afternoon, go down the ramp, go up the street and return to the Ayers later, along about 5:30, and the guard, making his rounds later came upon him in a prone position on the ground near the ramp.

Now, from all the circumstantial evidence in the case it looks as if he fell off the ramp at a certain point. Why, nobdy knows. However it happened he was using the ramp, either as a licensee or invitee of the American Ship Building Company. He knew more about the ramp than they did. By his appropriating their ramp as his ramp it almost became part of the structure leading to his own home. He knew more about it than they did. There wasn't any defect there he didn't have more knowledge of than the American Ship Building Company. So, knowing all about it, he certainly assumed the risk.

We are here concerned, really, with real estate law. We have to forget there is a ship here. We have to forget there is a dock here, and we have to talk about it as if it was real estate which Mr. Holm walked across there. Mr. Holm was taking a short-cut to his house. He walked across somebody else's lot, because he found that convenient. He could have walked all the way around the corner. He could have stayed on his own property, just like he could have used his own ladder. He decided for his own convenience to use this way of going aboard on somebody else's property, in the winter time, when ice does form and rain does create moisture and does attach itself

to the ground. If he was walking on a neighbor's lot over which he had been going for four months, and fell on a little ice and came down to the courthouse and said, "I am suing my neighbor because I fell on his lot, he ought to have known I walked across it, he ought to have gotten the ice off the lot"—then everybody in the courthouse would laugh at him. And that's the position we have here, although we know it is a very serious business because he was badly hurt.

The first question is, whose fault is it? I do not see, on a fair analysis of the case, taking everything the plaintiff says as true, how, as a matter of law, it is anybody's fault but his own. He decided to use the ramp. I can understand why he would. It was a wonderful convenience. But if he didn't want to assume the risk of injury all he had to do was use his own ladder. That would have been harder than walking up the luxurious ramp which happened to be attached to the front of the vessel, which to all intents and purposes looks like a gang plank of a passenger ship, four feet wide. He would have liked it to have been in better condition. He was the one using it, and he surely knew if it wasn't right, and he chose to use it. Having chosen to use it he now claims somebody else should have told him about the ice on there. He is the last one who looked at it. He says someone else should have kept it dry. He is the last one walked on it. He says he asked for salt that morning. The testimony is that he didn't go near the guard at the gate that morning, as the record shows. But assuming the truth of that, assuming he asked for it, is just asking for salt going to cure a bad condition which he can see, and on which he chooses to walk? If he knew about it all the time, he can hardly be heard to say he didn't see the danger. He used this ramp more frequently than anybody did. He just walked across it two hours before when he left at 3:30 preparatory to his return at 5:30. It looks from this circumstantial evidence in the case he fell from the ramp when he was eight or ten feet from

the top, because that's where the magazine was found that the guard had returned to him. It looks like he had not entered the ship, he didn't go up to the deck and come back because he was still carrying the eggs which he had purchased at the store, which were found in a broken condition when he fell. So he did fall from a point eight or ten feet from the top. No one can tell when he did that.

It wasn't the only means of ingress, it was the most convenient because it was easier for him to let somebody else supply it than to walk up a ladder. It was easier for him to walk straight up the ramp, which resembles a stairway than using a ladder to his own ship, which he, as ship keeper, should have put up between the boat and the dock, which he didn't put up because he found the appurtenances of this defendant company were convenient. No one blames him for using it. Anyone else would have used it under the same conditions. The question is, what is the legal responsibility of its owner if he decides to appropriate its use for his own convenience? And the answer is they have no more responsibility to him than a landlord or owner of property would have to a licensee. They would have the responsibility to him to not entrap him, not to leave a pit in which one could fall in the dark. They would have the responsibility to let him know if there was a cave under any part of the property and they knew it, as they would have to tell even a stranger, "Don't go back there or you will fall in." They would have had to warn him not to enter the property. There is no such situation here. He knew everything about the situation anyone could have known and he chose for his own convenience to assume the risk and he did assume the risk, and in law he has no claim whatsoever against this defendant.

I grant the motion and dismiss the action over the exception of the plaintiff.

Will there by anything else, gentlemen?

Mr. Landskroner: Note our exception.

Order

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 23,453

(Filed February 12, 1959)

[SAME TITLE]

This cause came on for trial on the 9th day of February, 1959, and the Court having heard the plaintiff's evidence, and the defendant having moved the Court at the close of the plaintiff's evidence to dismiss the action upon the ground that on the facts and law the plaintiff has shown no right to relief, and the Court being of the opinion that the defendant's motion is well taken, it is ordered that the action be dismissed for failure of proof, and that judgment be entered for defendant, with costs.

/s/ JAMES C. CONNELL,
Judge.

Dated: ..... 1959.

Judgment

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.